BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	

JOINT PETITION FOR RECONSIDERATION

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SUMMARY OF ARGUMENT

While the FCC has advanced the universal service program reflected in Section 254 of the 1996 Act in many areas, there are a number of aspects to the *Order* that require reconsideration and revision, particularly as they impact Commercial Mobile Radio Service ("CMRS") providers.

In its *Order*, the FCC has mistakenly determined, without any basis or substantive discussion, that the 1993 revisions to Sections 2(b) and 332 of the Communications Act were somehow eviscerated by Section 254 of the 1996 Telecommunications Act, thus allowing the states to mandate intrastate USF contributions from CMRS providers.

In recognizing that mobile services "by their nature operate without regard to state lines as an integral part of the national telecommunications infrastructure," Congress in 1993 specifically amended Section 2(b) in order to allow for exclusive FCC jurisdiction over the provision of CMRS formerly regarded as "intrastate." At the same time, Congress explicitly established, in Section 332(c)(3)(A), that CMRS providers would be obligated to contribute to state universal service programs only if the FCC later determined through a public proceeding that CMRS served as a substitute for landline telephone exchange service for a substantial portion of the communications within a state.

While Section 254 allocates general authority to states to administer intrastate universal service funds, nothing in the 1996 Act altered the prior jurisdictional shift contained in Sections 2(b) and 332. Section 332 acts as a limitation on the more general grant of authority in Section 254.

The FCC's reading out of existence Sections 2(b) and 332 is not supported by recent case law. In *Illinois Public Telecommunications Association v. FCC*, the D.C. Circuit upheld the FCC's assertion of jurisdiction over intrastate payphone compensation rates even in the absence of an amendment to Section 2(b) because the language of Section 276 was so straightforward on the issue of FCC jurisdiction. In *Competitive Telecommunications Association v. FCC*, the Eighth Circuit has just confirmed the continued viability of Section 2(b) as an allocator of substantive jurisdiction.

The jurisdictional regime enacted by Congress in 1993 and untouched in 1996 is a logical reaction to the inherently interstate nature of CMRS. Even the FCC has acknowledged the move in the wireless industry to nationwide geographic markets and has issued ever wider area licenses without regard to state borders. Furthermore, Congress' decision to designate all CMRS as interstate will not jeopardize USF programs, as CMRS providers will still be required to contribute to the federal USF program based on their wholly interstate end-user telecommunications revenues.

If the FCC remains committed to its present course and allows states to assess the revenues of CMRS providers for state universal service funds, the FCC should recognize the magnitude of these state assessments and the potential they have to materially affect the ability of CMRS providers to build out their facilities and provide services that might otherwise be competitive with the incumbent LECs or supported services that could be delivered more cost effectively than those of the incumbent LEC. The Kansas State Corporation Commission has already adopted an incredible 14.1 percent universal service assessment on all carriers, including CMRS providers. Given the high cost of obtaining spectrum and constructing wireless networks and the fact that demand for wireless services is very elastic, state universal service assessments on CMRS simply cannot be unlimited or they will violate the fundamental principle of competitive neutrality espoused by both the FCC and the Joint Board. Therefore, the Commission must determine the level at which state universal service requirements become impermissible barriers to entry in violation of Section 253 of the 1996 Act.

Given that the USF programs will involve the transfer of billions of dollars to thousands of recipients over many years, the FCC should establish a reasonable policing mechanism for auditing and identifying misuse of funds. While the *Order* calls for annual reports on the contribution and receipts of payments, it does not address the far more important need to verify that the funds are being spent appropriately and a process for recoupment where they are not. Procedures should also be established to provide refunds to contributors in cases where fraud or misuse is found to exist.

Finally, on reconsideration, the FCC must address several nuts and bolts issues of particular concern to the wireless industry. Specifically, using its explicit authority granted under Section 254(f), the FCC should establish that if CMRS providers are capable of offering the services required under the federal program, they are eligible to participate in state USF programs. This may require additional flexibility in the FCC's rules so as to not compel major changes in the way CMRS providers do business. For example, for both federal and state Lifeline programs, the FCC's rules should reflect that forgiveness or reduction of cellular access charges should be a permitted means for a CMRS provider to offer Lifeline services. The FCC's rules should further reflect the fact that waiver of a cellular subscriber's activation fee should be treated as a valid Link-Up credit.

To ensure competitive neutrality, the FCC should recognize potential payor/ providers are not similarly situated in their ability to absorb or to pass universal service contributions through to their end user customers. Incumbent LECs can pass the lion's share of their USF contributions to access customers, thereby cushioning the effects of the levy. Unless all carriers who must collect USF funds are required to reflect this fact on end-user bills, CMRS and other providers in competitive markets will be uniquely competitively disadvantaged. For the Commission to suggest that labeling the assessment as mandatory is misleading fundamentally misunderstands the marketplace reality of these quasi-tax assessments that are surcharges on carrier revenue and how they may affect smaller non-incumbents who operate in competitive markets. Finally, the FCC should provide specific guidance as to how CMRS providers may identify the revenue base, excluding resellers, that will be subject to the federal universal service obligation.

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JOINT PETITION FOR RECONSIDERATION

I. INTRODUCTION

Pursuant to 47 C.F.R. § 1.429(a), Comcast Cellular Communications, Inc. ("Comcast") and Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorneys, hereby submit this *Joint Petition for Reconsideration* of the Commission's *Orders* in the above-captioned proceedings.[1/] While the FCC has advanced the universal service program reflected in Section 254 of the 1996 Act in many areas, there are a number of aspects to the *Order* that require reconsideration and revision. From the perspective of CMRS providers, the FCC has perpetuated a legal misunderstanding regarding the nature of its jurisdiction over CMRS. Failure to remedy this defect on reconsideration will lead to appeals and a reversal of the FCC.

Additionally, while the FCC stated that it encouraged CMRS providers to become participants in federal and state Universal Service Fund ("USF") programs, its lack of

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1/ *See In the Matter of Federal State Joint Board on Universal Service*, Report & Order, CC Docket No. 96-45 (released May 8, 1997) (hereafter *Order*); Order on Reconsideration, FCC 97-246 (released July 10, 1997) (hereafter *Reconsideration Order*). As facilities-based carriers of wireless telecommunications services, Comcast and Vanguard are interested parties in this proceeding within the meaning of 47 C.F.R. § 1.429(a).

sensitivity to the differences in landline and wireless service delivery may guarantee that CMRS will not participate, but rather only pay into USF programs. On reconsideration, the FCC must use the authority Congress provided it under Section 254(f) to craft rules that constrain or appropriately channel state or federal USF program behavior that discriminates against CMRS providers. A critical aspect of creating competitive neutrality in the formation and administration of USF programs is to prohibit state programs from unreasonably excluding CMRS providers. Finally, to maintain the public trust, the FCC and state USF programs must have the integrity that comes from thorough monitoring and auditing of use and misuse of USF funds. The FCC must create robust and reliable reporting and auditing requirements imposed on the beneficiaries of USF largesse.

II. FCC MUST FOLLOW THE DICTATES OF THE LAW AND ASSERT EXCLUSIVE JURISDICTION OVER CMRS

A. Section 2(b) and 332 Shift CMRS Jurisdiction to FCC

1. Section 2(b) Was Amended to Grant FCC Jurisdiction of "Intrastate" CMRS

With the passage of the 1993 Budget Act[2/], Congress amended Sections 2(b) and 332 of the Communications Act to create a uniform federal framework for the regulation of CMRS. The amendment of Section 2(b) was an extremely significant event. Section 2(b) traditionally "fenced off" from FCC jurisdiction and reserved to the states authority over intrastate telecommunications services. In the 1986 *Louisiana PSC* decision,

2/ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312 (1993).

the Supreme Court interpreted Section 2(b) as denying the FCC jurisdiction over all aspects of intrastate telecommunications that are severable from the interstate portion or do not conflict with a Federal policy.[3/] Cognizant of the Court's reading of 2(b),[4/] Congress consciously amended "the fence" to provide for the uniform federal regulation of CMRS. The new language states that:

> Except as provided in . . . *[S]ection 332*, . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction over all charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ."[5/]

There can be no question that Section 2(b)'s reservation of jurisdictional authority over wireless intrastate telecommunications to the states was eliminated by the Budget Act.[6/]

3/ *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 372-76 (1986) ("*Louisiana PSC*").

4/ The Court noted that the main clause of 2(b) is itself a "rule of statutory construction . . . . [that] presents its own specific instructions regarding the correct approach to the statute which applies to how we should read §220." 476 U.S. at 376-7 n. 5. The adverbial clause introducing 2(b) limits the scope of the main clause.

5/ 47 U.S.C. § 152(b) (emphasis added to 1993 language).

6/ The FCC has previously deferred reaching this jurisdictional question. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, 16005 (1996) ("We acknowledge that section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection; we simply decline to define the precise extent of that jurisdiction."). The 8th Circuit lifted its stay on CMRS interconnection provisions that it had imposed globally on the *Order*, based on its apparent view that the FCC has unique jurisdiction over CMRS in light of the statutory changes in the 1993 Budget Act. *See Iowa Util. Bd. v. FCC* and consolidated cases, No. 96-3321 et al., *partial stay granted pending*

(continued...)

The Budget Act was not the first time Congress has amended Section 2(b) in order to reassign jurisdictional roles where a change was necessary or appropriate to advance a federal purpose. It did so in 1978 to permit FCC regulation needed for new CATV pole attachments provisions, in 1990 for telephone relay service requirements, and in 1991 for telemarketing fraud protections. In each case, a reference to these provisions was included in Section 2(b) to remove any argument that there was a limitation on the Commission's jurisdiction over the substantive provision's subject matter.[7/]

Even if the legal result were not plain from the amendment of Section 2(b), Congressional intent as expressed in the language of Section 332 is buttressed by legislative history showing that the purpose of this section "is to establish a Federal regulatory framework to govern the offering of all commercial mobile services."[8/] The Conference Report explains that:

> The Commission should permit the States to regulate radio service provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service. If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other,

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6/ (...continued)
review, 109 F.3d 418 (8th Cir. 1996), *order lifting stay in part*, *Competitive Telecommunications Ass'n v. FCC*, No. 96-3604 (8th Cir. Nov. 1, 1996).

7/ *See* Communication Act Amendments of 1978, Pub. L. 95-234, § 234, § 3, *reprinted in* 1978 U.S.C.C.A.N. § 2 Stat. 33, 35; Americans with Disabilities Act of 1990, Pub. L. 101-336, Title IV, §401(a), *reprinted in* 1990 U.S.C.C.A.N. 104 Stat. 327, 366-369; Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, *reprinted in* 1991 U.S.C.C.A.N. 105 Stat. 2394.

8/ H.R. Rep. No. 213, 103rd Cong., 1st Sess. 490 (1993) ("Conference Report").

> such that consumers can choose among alternative providers of this service, it is not the intention of the conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means.[9/]

Similarly, the House Report noted that the 1993 statutory changes were intended to "foster the growth and development of mobile services that, *by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.*"[10/]

Congress also explicitly considered, in Section 332(c)(3)(A), the question of CMRS providers' obligations to contribute to universal service programs:

> Nothing in this subparagraph shall exempt providers of commercial mobile services (*where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State*) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.[11/]

2. FCC Has Not Correctly Assessed the Impact of Sections 332 and 2(b) on CMRS Universal Service Obligations

The *Order* curiously has interpreted Section 254 of the Telecommunications Act of 1996 ("1996 Act")[12/] as permitting states to impose state universal service funding obligations on CMRS providers. While the FCC's basis for reaching this conclusion is absent from the *Order*, it is plain that the FCC overlooked a fundamental problem with its

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9/ *Id.* at 493.

10/ H.R. Rep. No. 111, 103rd Cong. 1st Sess. 260 (1993).

11/ 47 U.S.C. § 332(c)(3)(A) (emphasis added).

12/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

conclusion. As a result of the 1993 amendment to Section 2(b) affecting CMRS, there is no longer any "intrastate" CMRS service that could be subject to an intrastate USF program.

Putting aside this fundamental legal impediment to state regulation, Section 332(c)(3)'s exemption from state universal service obligations of all CMRS providers that do not provide a substitute for land line local exchange service for a substantial portion of the state is yet another limitation on Section 254's more general allocation of authority to states to administer intrastate universal service programs. Stated differently, through Section 332 Congress established its own rule of statutory construction, just as the Supreme Court in *Louisiana PSC* determined Section 2(b) to be an interpretive provision for other portions of the Act.[13/]

Nothing in the 1996 Act disturbs the conclusion that Sections 2(b) and 332 are fully in effect. Section 601(c)(1) of the 1996 Act states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State or local law unless expressly so provided in such Act or amendments."[14/] The 1996 Act itself specifically recognizes the continued viability of Section 332 in Section 253(e), noting that "nothing in this section shall affect the application of 332(c)(3) to commercial mobile providers." In addition to these explicit provisions in the 1996 Act, two standard principles of statutory interpretation also conflict with the FCC's expressed view: (1) the repeal of

13/ *See Illinois Public Telecommunications Assoc. v. FCC*, No. 96-1394 (D.C. Cir. July 1, 1997) (citing *Louisiana PSC* and holding that Section 276 of the 1996 Act is subject to the interpretative limitations of Section 2(b)).

14/ 1996 Act § 601(c)(1), 110 Stat. at 143 (1996).

laws by implication is disfavored; and (2) general provisions (e.g., Section 254) are subordinate to and must be interpreted in light of more specific provisions (e.g., Section 332(c)(3)).

A Connecticut state court recently interpreted Section 332(c)(3) to prohibit state public utility commissions from requiring contributions by CMRS providers unless they serve as a substantial substitute to wireline service:

> By expressly exempting from preemption those assessments which are made on cellular providers in a state in which cellular service is a substitute for land line service, Congress left no ambiguity that cellular providers in states in which cellular is not a substitute for land line service fall under the umbrella of federal preemption. Accordingly, it is held that the Budget Act preempts the [Connecticut utility commission] from assessing Metro Mobile for payments to the Universal Service and Lifeline Programs.[15/]

The Petitioners support this reading as the only possible construction of the unambiguous statutory language.

B. Recent Case Law Confirms the Significance of Petitioners' Jurisdictional Analysis

Two recent U.S. Court of Appeals cases also undermine the FCC's reading of the law to permit shared federal-state jurisdiction over universal service requirements for CMRS providers. In *Illinois Public Telecommunications Association v. FCC*,[16/] the D.C. Circuit examined jurisdictional contentions regarding the scope of Section 276 of the 1996 Act,

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15/ *Metro Mobile CTS, Inc. v. Connecticut Dep't of Public Utility Control*, No. CV-95-0051275S (Conn. Super. Ct., Dec. 9, 1996).

16/ No. 96-1394 (D.C. Cir. July 1, 1997).

which pertains to compensation for payphone service providers. The court upheld the FCC's assertion of jurisdiction over both intrastate and interstate payphone compensation rates. Despite the arguments by NARUC and other state representatives that Congress had not amended Section 2(b) and that therefore the language of Section 276, standing alone, was insufficient to support realignment of jurisdictional authority, the court ruled that Congress in Section 276 gave the FCC "an express mandate to preempt State regulation of local coin calls."[17/]

The elimination of state regulatory authority over CMRS contained in Sections 2(b) and 332 is explicit, even more so than in Section 276. The FCC therefore has no reason to conclude it may reassign jurisdictionally interstate CMRS matters, such as universal service funding, to state commission jurisdiction.

In *Competitive Telecommunications Association v. FCC*,[18/] the Eighth Circuit generally upheld the FCC's conclusions on phasing-in certain aspects of the 1996 Act's interconnection regime that impacted upon access reform. However, the court noted that "[w]hile we recognize the FCC is merely "allowing" the state commissions to continue to allow the LECs to collect access charges on intrastate calls, we believe that such an assertion of regulatory power is beyond the scope of the FCC's jurisdiction."[19/] By this the

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17/ *Id.*

18/ No. 96-3604 (8th Cir. June 27, 1997).

19/ *Id.* at n.5.

court was referring to the traditional bifurcated interstate-intrastate authority the states and the FCC share over landline telecommunications.

Likewise, the *Order's* determination that states should be allowed to assess intrastate universal service fund contributions on CMRS revenue simply is not within the FCC's authority. Congress enacted no provision in the 1996 Act allowing the FCC to delegate or share its CMRS jurisdiction with state commissions. Both these recent cases reinforce the need for FCC reconsideration of its conclusions regarding CMRS' place in intrastate USF programs.

C. FCC Should Acknowledge CMRS as a Wholly Interstate Service

The FCC and the courts have held consistently that jurisdiction over communications services is to be determined by the nature of the communications, not the physical location of the facilities.[20/] For instance, a call carried on intrastate facilities is jurisdictionally an interstate communication subject to federal regulation when the call is connected to an interstate network.[21/]

CMRS is a prime example of an interstate nationwide "network of networks." As noted above, the legislative history of Section 332 expresses the view that mobile services

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20/ *See, e.g., Lincoln Telephone v. FCC*, 659 F.2d 1092, (D.C. Cir. 1981), in which the Court of Appeals rejected the state's argument that the Commission lacked jurisdiction over Lincoln Telephone because all of the company's facilities were located within the state. "[T]hose facilities or services that substantially affect provision of interstate communication are not deemed to be intrastate in nature even though they are located or provided within the confines of one state." *Id.* at 1109 n.5.

21/ See *New York Telephone v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980).

"by their nature operate without regard to state lines."[22/] The FCC itself has noted that CMRS ownership concentrations and service offering expansion is moving the majority of the wireless industry toward nationwide geographic markets.[23/] By licensing PCS using Major Trading Areas (MTAs) and Basic Trading Areas (BTAs) that do not respect state boundaries, and by allowing the development of cellular regional supersystems, the FCC itself has recognized the inherently interstate nature of the service.

Leaving aside the legal reasons for treating CMRS as an interstate service, there are enormous practical problems associated with identifying or classifying wide area wireless traffic as intrastate. The facilities used in providing CMRS often defy an easy classification, as calls originating and terminating in one state may be connected by a switch located in another state. Additionally, due to the mobile nature of the service, a call that begins as "intrastate" may become "interstate" as one party crosses a state border during the call. Thus, determining what portion of CMRS revenues is "interstate" in nature becomes an artificial and arbitrary process. A more logical approach, and one accurately reflecting the law, would be to explicitly recognize CMRS as a wholly interstate service and treat CMRS traffic and revenues accordingly.

22/ H.R. Rep. No. 111, *supra* note 10.

23/ *See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, First Report*, FCC 95-317, at ¶¶ 59, 63-4 (August 18, 1995).

D. CMRS Providers Have Interstate Universal Service Fund Contribution Obligations

A determination that all CMRS services and thus all CMRS end-user telecommunications revenues are jurisdictionally interstate would not adversely impact the Congressionally-mandated goal of ensuring universal availability of telecommunications services at affordable rates throughout the nation. It is plain that CMRS providers are telecommunications carriers and as such have USF contribution obligations. Under an appropriate reading of the 1996 Act, CMRS providers would not be exempted from universal service payment obligations but rather would pay into interstate USF programs. Such a framework would encourage CMRS expansion as envisioned in the unrepealed 1993 Budget Act by ensuring that CMRS providers will be subject to only a single coherent and consistent fund contribution policy rather than fifty inconsistent and potentially discriminatory overlays on the federal program.

E. The *Order* Improperly Provided No Explanation for its Conclusions as to CMRS

The *Order* assumes, without any basis or substantive discussion, that Sections 2(b), 332 and 254(f) can be read to require CMRS contributions to state universal service programs. Many CMRS commenters pointed out that these provisions are in harmony and do not allow CMRS to be treated as intrastate for universal service purposes, but the FCC's conclusion wholly ignores Sections 2(b) and 332 and the presence of these legal arguments in the underlying record. The FCC has an obligation to address these arguments and to present the factual or legal reasons for its conclusion. To do otherwise constitutes arbitrary and capricious decision-making.[24/]

III. SHOULD THE FCC CONTINUE TO PERMIT STATES TO ASSESS CMRS PROVIDERS ON AN INTRASTATE BASIS, THE FCC MUST ENSURE THAT STATES DO NOT DISCRIMINATE AGAINST CMRS PROVIDERS

A. Universal Service Funding Rules Will Affect the Ability of CMRS Providers to Compete in Their Traditional and New Markets

The Petitioners believe that the statutory framework does not permit states to assess CMRS providers for intrastate USF programs. Nevertheless, if the FCC remains committed to its present course, there may be some period of time prior to court reversal during which CMRS providers will be compelled by some state regulators to contribute to state USF programs. The magnitude of state assessments could materially affect the ability of CMRS providers to continue to build out their facilities and to provide competitive services. Significantly, state universal service obligations that are out of line with federal assessments may frustrate the FCC's goal of creating meaningful competition to the services of landline incumbents. Accordingly, the FCC must be sensitive to state universal service programs that result in skewing competition or dampening CMRS providers incentive to invest in telecommunications infrastructure.

24/ *See City of Brookings Municipal Telephone Co. v. FCC*, 822 F.2d 1153, 1168 (D.C. Cir. 1987) (reversing an FCC order that failed to provide reasons for the agency's decision); *Celcom Communications Corp. v. FCC*, 789 F.2d 67, 71 (D.C. Cir. 1986) ("[T]he agency must consider the relevant evidence presented and offer a satisfactory explanation for its conclusion.")

As an initial matter, some telecommunications providers, particularly incumbent LECs, can more easily absorb double digit state universal service contributions because both federal and state regulation typically permit these carriers to pass most of their universal service costs to their access, rather than to their end-user, customers. To the extent the *Order* considers the impact of universal service fund contributions on non-ILECs, the *Order* assumes that non-ILECs have the ability to choose whether to pass through USF contributions to end-users. The marketplace reality is that deep-pocket carriers can off-load the lion's share of their contributions and decide not to pass USF costs onto consumers. Inevitably, such determinations will force other providers to follow suit. Those providers that for economic reasons cannot absorb the costs or move them elsewhere will be forced to exit the market.

The FCC's *Order* did not take into account critical economic differences that characterize different segments of the telecommunications market. USF contributions will affect wireless carriers far differently than ILECs or than interexchange carriers. Given the high cost of obtaining spectrum and constructing wireless networks which have comparatively low subscriber penetration, and the fact that the demand for wireless services is very elastic, state universal service assessments on CMRS simply cannot be unlimited. Indeed, the Commission must determine the level at which state universal service requirements become impermissible barriers to entry in violation of Section 253. If the FCC is unwilling to address the unique issues presented by the wireless industry, it will create a marketplace where systems of federal and state universal service subsidies are not competitively neutral, but significantly favor landline providers (particularly incumbents) over wireless providers and skew the competitive landscape away from wireless providers that might otherwise be more efficient universal service providers.

B. Recent State Commission Actions Suggest that State Universal Service Funds Will Impose Onerous Contribution Rates on Wireless Providers

The Petitioners' concerns about the impact of state USF programs on CMRS providers are not fanciful. State commissions historically have regarded wireless carriers as cash cows that can be milked without regard to the impact draconian assessments may have on the extremely elastic demand for wireless services.

In Kansas, the Kansas State Corporation Commission ("KSCC") has set a state universal service rate so high that no wireless carrier would be motivated to do business or invest in wireless infrastructure in that state. The KSCC USF program will assess intrastate carrier retail revenues at a remarkable 14.1 percent.[25/] The KSCC was sensitive both to ILEC claims that this assessment might cause rate shock and sensitive to concerns of interexchange carriers that they derive some benefit from their contributions. The KSCC ordered a 30 percent reduction in intrastate access charges and fashioned a three-year rate phase-in that allocates $2.00 per month increases in local rates for the first year; $1.00 per month throughout the second and the remainder of a total $3.21 increase in the third year.

25/ *See In the Matter of a General Investigation Into Competition Within the Telecommunications Industry in the State of Kansas*, Docket No. 190-492-U; 94-GIMT-478-GIT (issued December 27, 1996) ("hereafter *Kansas Order*").

The KSCC gave short shrift to the unique issues associated with the impact of state USF program contributions of 14.1 percent on the wireless industry. After a cursory analysis of the 1996 Act's definition of telecommunications carriers, the KSCC simply concluded that "[s]tate universal service funds assessments are authorized by the" 1996 Act. The KSCC held that "[w]ireless/PCS providers must contribute to the KUSF funding" on the basis of intrastate retail revenues.[26/] This 14.1 percent tax was imposed on wireless providers even though CMRS providers will not benefit from intrastate access charge reductions.[27/] Finally, uncertain of the effects of its 14.1 percent tax, the KSCC held that marketplace "changes may provide compelling reasons for future revision to allow different treatment [of particular types of carriers] based upon developing criteria."[28/] The KSCC did not indicate, however, what those criteria might be or what marketplace conditions must be present to afford CMRS providers some type of offsets for the enormous new burdens the KSCC has determined that CMRS providers should take on. The Petitioners are concerned that other states will follow Kansas' example unless the FCC provides state commissions with clear guidance as to what is an acceptable basic program that is consistent with the Commission's rules.

26/ See *Kansas Order* at ¶ 110.

27/ The Kansas Commission's assessment scheme is particularly discriminatory as between CMRS and interexchange carriers ("IXCs") because while both carriers' revenues will be assessed to the same extent, the IXCs will realize a benefit, in the form of a 30 percent reduction in access charges and resulting demand stimulation effects, not realized by wireless carriers.

28/ *See Kansas Order* at ¶ 196.

C. The FCC Must Provide State Commissions with Clear Guidelines as to Which State Funding Mechanisms Are Inconsistent with the FCC's Rules

Both because of the enormous amount of funds involved and the impact that an improper assessment of burdens and benefits will have on the development of competition generally as well as the important need to encourage competition for USF program funds, it is imperative that FCC rules be plain and concise on the subject of state funding initiatives. Without careful elaboration on the basic framework, state programs may ultimately prove to operate as a barrier to competitive market entry to wireless carriers as well as other types of new market entrants.[29/]

The *Order* and the resulting rules appear to neglect what will be a very critical aspect of the relationship of federal and state USF programs, that is, the consistency of requirements among and between federal and the various state plans. Without some basic level of consistency set by the FCC, many potential participants in state USF programs will be disqualified, perhaps for no good reason.

The statute provides for the FCC to set basic program requirements binding upon the states. Section 254(f), entitled *State Authority*, states:

> A State may adopt regulations *not inconsistent with the Commission's rules* to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or

29/ *See Order* at ¶ 136.

> standards that do not rely on or burden Federal universal service support mechanisms. (emphasis added).

A critical aspect of the Petitioners' concern relates to the *Order's* apparent allowance of state USF programs plainly inconsistent with the FCC's own judgments about USF program eligibility. Indeed, the *Order* and, more importantly, the FCC rules are silent on the question of whether states may impose wireline USF program funding obligations on CMRS providers without regard to whether that state permits CMRS providers to be eligible for state universal service funds and without regard to whether such a result is inconsistent with the principle of competitive neutrality adopted both by the Joint Board and the FCC. On reconsideration, the FCC must effectively address this issue. The FCC must do more than encourage states to allow CMRS providers access to USF programs. The FCC's rules should explicitly direct states to allow CMRS providers to receive universal service subsidies if the CMRS provider provides supported services.[30/]

In this regard, the FCC should revise its "all or nothing rule" which would require CMRS providers to provide all the supported services or receive no universal service subsidies for the services they are capable of and do support.[31/] The FCC must devise a set of comprehensive but simple rules regarding what constitutes a service eligible for universal service support. The FCC should develop a presumption that the set of specified interstate

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30/ *See Order* at ¶ 136.

31/ *See Order* at ¶ 87. Cellular providers typically provide service on a per minute basis rather than on a flat-rated basis. The FCC and the states must not exclude CMRS providers from receiving support simply because the economics of wireless networks function differently than wireline networks.

services, flexibly applied, are adequate for state programs as well. It should be conclusive that if CMRS providers are capable of offering the services required under the federal program, they are eligible to participate in state programs. Further, the FCC should look again at each of its supported service criteria to ensure that they are truly technologically, and therefore competitively neutral.[32/] It is not enough that a requirement apply uniformly if that requirement eliminates a logical and capable provider of USF services, such as CMRS providers.

For example, for both federal and state Lifeline programs, the FCC's rules should reflect that actual forgiveness or reduction of cellular activation charges reflecting the program subsidy amount should be a permitted means for a CMRS provider to offer Link-up services. The FCC rules should reflect the fact that waiver of a cellular subscriber's activation fee should be defined as a valid Link-Up credit to activate basic local telephone service. Similarly, a reduction in a cellular subscriber's access fee should permit the cellular carrier to gain access to Lifeline funds.[33/] This result is required by the Commission's holding in the *Order* that "funding mechanisms for Lifeline should be made more competitively neutral" and should not favor one technology over another.[34/]

32/ *See Order* at ¶ 145.

33/ The Commission held that "Congress did not intend to codify the existing Lifeline program so as to immunize it from *any* future changes or improvements." *Order* at ¶ 336 (emphasis in original).

34/ *See Order* at ¶ 364.